

AUG 23 2006**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ONECIMO DURAN-MERCADO,

Defendant - Appellant.

No. 05-30202

D.C. No. CR-01-05558-1-RBL

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Ronald B. Leighton, District Judge, Presiding

Argued and Submitted April 7, 2006
Seattle, Washington

Before: CANBY, GOULD, and BEA, Circuit Judges.

Onecimo Duran-Mercado appeals his 168-month sentence imposed after his conviction, following a guilty plea, for distributing more than 50 grams of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and (b)(1)(C). Before Duran-Mercado's second sentencing hearing, the district court held an

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

evidentiary hearing to assess the credibility of Duran-Mercado's claim that his cousin threatened to kill his family if he did not sell methamphetamine. The court determined that Duran-Mercado was not credible, that he was a willing participant in the scheme, and thus that the applicable Sentencing Guidelines range was 188 to 235 months. Noting its aim to sentence Duran-Mercado to the same term that his co-defendants had received, the court imposed a below-Guidelines sentence of 168 months. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.¹

The district court did not abuse its discretion in sequestering Dr. Judd, a defense expert witness, from the evidentiary hearing because Duran-Mercado did not show that Dr. Judd's presence in the courtroom was necessary for the management of the case. *See United States v. Seschillie*, 310 F.3d 1208, 1213 (9th Cir. 2002).²

The district court did not violate Duran-Mercado's Fifth Amendment privilege against self-incrimination by stating that the coercion allegation "was an

¹ Because the parties are familiar with the facts and procedural history, we do not restate them here except as necessary to explain our disposition.

² Duran-Mercado also asserts that, by sequestering Dr. Judd, the district court failed to accommodate the special needs of a defendant with mental disabilities and therefore violated Duran-Mercado's due process rights. This issue was not raised before the district court, and therefore it is waived. *See United States v. Smith*, 424 F.3d 992, 1015 (9th Cir. 2005).

argument that was minted well after one would expect such an argument to be exposed to the officers or to attorneys.”³ Duran-Mercado raised this allegation for the first time in a safety valve proffer submitted in anticipation of his resentencing. It is, therefore, unclear whether the court was noting the discrepancy between Duran-Mercado’s assertions at his first sentencing hearing and the more recent coercion allegation, which would not implicate the Fifth Amendment, or whether the court was improperly weighing Duran-Mercado’s silence regarding this allegation from the time of his arrest through his first sentencing, *see Mitchell v. United States*, 526 U.S. 314, 328-29 (1999). Even if the court did improperly consider Duran-Mercado’s post-arrest silence in assessing the credibility of his coercion allegation, however, such error was harmless because the court gave ample independent reasons why it found Duran-Mercado not to be credible. *See United States v. Velarde-Gomez*, 269 F.3d 1023, 1034-35 (9th Cir. 2001) (en banc).

Finally, the district court’s tacit denial of Duran-Mercado’s request for a downward departure based on his asserted lack of knowledge of the purity of the methamphetamine does not require a remand for resentencing because we conclude

³ We review de novo whether the court’s reference to Duran-Mercado’s silence violated his Fifth Amendment privilege against self-incrimination. *See United States v. Bushyhead*, 270 F.3d 905, 911 (9th Cir. 2001).

that Duran-Mercado's 168-month sentence was reasonable. *See United States v. Mohamed*, No. 05-50253 (9th Cir. Aug. 11, 2006). The district court considered the Guidelines to be advisory, weighed the need to avoid disparate sentences with Duran-Mercado's co-defendants, and imposed a sentence below the Guidelines range.

AFFIRMED.